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No. 84-1234

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

LOUIE L. WAINWRIGHT, Secretary
Department of Correctons,
State of Florida,

Petitioner,

v.

FREDDIE LEE HALL,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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24 pp

QUESTIONS PRESENTED

I.

A. Whether the Court of Appeals properly remanded this case to the District Court for a hearing to determine if Respondent "deliberately bypassed" his opportunity to present evidence on his constitutional claims in the state court when the record does not resolve this disputed issue of fact?

B. Whether, in any event, a state court hearing for which Respondent's counsel had no opportunity to prepare and to present evidence satisfies the requirements of 28 U.S.C. § 2254(d)?

II.

Whether the Court of Appeals, if it erred at all in remanding this case to the District Court for a hearing on the reasons for Respondent's absence from several phases of his trial--including a portion of the selection of his jury--erred in favor of the Petitioner, since the record was sufficient to warrant issuance of the writ of habeas corpus outright?

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 733 F.2d 766 (11th Cir. 1984). It is also reproduced in the Appendix to the Petition for a Writ of Certiorari at pp. A1-94. The opinion of the United States District Court for the Middle District of Florida is reported at 565 F. Supp. 1222 (M.D. Fla. 1983), and reproduced in the Appendix at pp. A98-206. The order of the United States Court of Appeals for the Eleventh Circuit denying petitions for rehearing or rehearing en banc is reproduced at pp. A85-97. The District Court's order denying rehearing is reproduced at A207-230. The opinion of the Supreme Court of Florida affirming Mr. Hall's conviction on direct appeal is reported at 403 So.2d 1321 (1981). The Florida Supreme Court's decision affirming the denial of post-conviction relief pursuant to Fla. R. Cr. P. 3.850 and denying an original petition for a writ of habeas corpus is reported at 420 So.2d 872 (1982).

JURISDICTION

The Court of Appeals rendered its decision on May 16, 1984, and denied timely filed cross-petitions for rehearing or rehearing en banc on November 30, 1984. The petition for a writ of certiorari was filed on January 29, 1985. Mr. Hall filed a cross-petition for a writ of certiorari pursuant to Rule 19.5 on

February 28, 1985. This Court extended the time for filing this Brief in Opposition until April 19, 1985, by a letter dated March 18, 1985.

STATEMENT

A Florida jury found Freddie Lee Hall guilty of first degree murder, based upon his participation in a criminal venture with Mack Ruffin,[1] on June 23, 1978. The jury recommended a capital sentence, and the trial judge imposed a sentence of death on June 27, 1978. The same attorneys who represented Hall at trial also served as counsel on direct appeal to the Florida Supreme Court, which affirmed Hall's conviction on July 16, 1981. No petition for rehearing or petition for a writ of certiorari was filed.

Despite the diligent efforts of the Clearinghouse for Criminal Justice to find an attorney for Mr. Hall (Affidavit of Scharlette Holdman), he was unrepresented until September 21, 1982, twelve days after the governor signed his death warrant, and only two weeks before his scheduled execution. On September 20, 1982, the trial judge ordered the Office of the Public Defender for the Fifth Judicial Circuit to interview Mr. Hall, advise him of his rights under Fla. R. Cr. 3.850, and to determine whether he wanted assistance in filing a motion to vacate or set aside his sentence and conviction. The Public Defender's office met with Mr. Hall the following day, and on September 22, 1982, notified the trial court that it would represent him in post-conviction proceedings. Mr. Hall's attorney immediately set to work reviewing the trial record, and learning the Florida law of post-conviction remedies. The trial judge also imposed an impossible deadline on these efforts: he ordered counsel to file the Rule 3.850 motion by September 27, later extended to 9:00 a.m. on September 28, and set September 30 for an evidentiary hearing.

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[1] The State introduced no evidence to show that Mr. Hall had taken life or intended that Ruffin take life. Rather, his conviction and death sentence were premised upon "togetherness" and accomplice liability under Florida law before this Court's decision in Enmund v. Florida, 458 U.S. 752 (1982). See Cross-Petition, Docket No. 84-6326 at 18-21.

Mr. Hall's attorney sought relief from the schedule established by the trial judge in a Petition for a Writ of Mandamus or Prohibition in the Florida Supreme Court filed on September 22, 1982. The Supreme Court denied that petition on September 24, 1982.

The attorneys who had represented Mr. Hall at trial and on appeal compounded the problem facing the Public Defender's office by refusing to release their files until immediately before the scheduled evidentiary hearing. As a result, despite over one hundred hours of research, writing, and investigation compressed into a week, Mr. Hall's post-conviction attorney was not prepared to conduct an examination of two skillful and hostile witnesses.

At the hearing, counsel emphatically protested the limitations the trial court had placed upon his investigation and preparation for the hearing. He explained that he had not had an opportunity to interview or to depose Mr. Hall's trial counsel, and therefore was unable to conduct a meaningful examination. Recognizing that trial counsel would resist a finding of ineffectivensss in their performance, and that an attempt to examine skilled advocates without a full opportunity to review their records and to collect information would be futile, Mr. Hall's attorney advised the court that he was not prepared to go forward. (A40.) Counsel expressly disavowed any intention to "sandbag" the State. See A39. Rather, he insisted, he simply could not--consistent with professional standards--allow Mr. Hall's fate to depend upon findings of fact based upon a hearing for which he was not, and could not have been, prepared. See A50-53.

The trial court denied relief on October 1, 1982, finding that Mr. Hall's counsel were generally highly competent attorneys, but making no specific findings about the reasons for their failure to protect Mr. Hall's rights at trial or on

appeal.[2]

The Florida Supreme Court affirmed. In its decision, the Supreme Court explained:

> Hall had two attorneys at trial, and these attorneys also represented him on appeal. In his order denying the motion to vacate, the trial court recited his familiarity with the attorney's work in this case and in general. He "has always found both men to be well-prepared, able, thorough, effective and competent attorneys." Although available at the hearing, Hall did not choose to question them regarding their alleged incompetency, instead, evidently, choosing to let a cold record speak for itself.
>
> Almost any attorney, including the one who conducted the trial, can look at a prior trial and point to things that could have been done differently; hindsight makes us all better advocates. A defendant is assured of a fair trial, not a perfect one. Despite Hall's contentions, we can find nothing in the record to support his claim of ineffective assistance of counsel.[3] 420 So.2d at 874.

The decisions of the state courts rested not on findings that Mr. Hall's trial counsel had tactical reasons for the dereliction enumerated in the Rule 3.850 motion, but upon the erroneous legal conclusion that the trial record--even without a tactical justification--did not support Mr. Hall's claim of ineffective assistance.[4]

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[2] Even if the trial judge might be considered to have an insight into "tactical" reasons for departures from professional standards at trial, he certainly had no such knowledge concerning the failure to raise issues on appeal.

[3] The Supreme Court also affirmed the trial court's denial of a continuance. Far from chastising counsel for an attempt to "sandbag" the State factfinding process, the Court "commend[ed] him for the effort he has expended in representing his client and the diligence with which he has pursued the task appointed to him." Id.

[4] In contrast to the situation in Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 3502 (1984), trial strategy cannot possibly explain many of the failures of counsel in this case. The claim in Strickland was based upon counsel's failure to investigate and to present evidence in mitigation, and was presumptively justified by a strategy relying upon Washington's guilty plea and acceptance of responsibility for his crime. But Mr. Hall's counsel failed to protect him against prosecution and conviction and sentencing based upon an unconstitutional legal theory, and from conviction based upon constitutionally defective jury instructions. Indeed, had counsel preserved--or even raised on direct appeal--objections to the trial court's instructions limiting the jury's consideration of evidence in mitigation to the factors listed in the Florida statute, Mr. Hall would not be before this Court. Although he was tried a week before this Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978), Mr. Hall's direct appeal was not decided until after that decision and after the Florida Supreme Court's ruling in Songer

Mr. Hall filed a Petition for a Writ of Habeas Corpus on October 5, 1984. The United States District Court for the Middle District of Florida granted a stay of execution, and deferred ruling upon the petition while Ford v. Strickland, 696 F.2d 804 (11th Cir.), cert. denied, 104 S.Ct. 201 (1983), was pending before the Eleventh Circuit en banc. Then, on August 15, 1983, it denied the petition without a hearing. Insofar as is relevant to the issues presented in this petition, the District Court's order rested on three propositions: (1) Mr. Hall's attorney "deliberately bypassed" the trial court hearing on the Rule 3.850 motion; (2) Mr. Hall's trial and appellate counsel were not constitutionally ineffective despite their failures, inter alia, to contest erroneous and highly prejudicial jury instructions, to retain experts to investigate critical scientific evidence, and to present a case in mitigation of sentence;[5] and (3) although

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v. State, 365 So.2d 697 (1978), cert. denied, 441 U.S. 956 (1979). In contrast to the situation in Hitchcock v. Wainwright, 745 F.2d 1332 (11th Cir. 1984), rehearing en banc granted, ___ F.2d ___ (January 5, 1985), and the cases cited therein, it is clear from the record of this case that the trial judge believed that evidence in mitigation was limited to the factors listed in the death penalty statute, that he communicated this belief to the jury in his instructions, and that he communicated this belief to counsel.

[5]Despite the short period of time available in which to review the record and to conduct an investigation, Mr. Hall's attorneys uncovered more than twenty serious derelictions by his trial and appellate counsel which, individually and collectively, departed from professional standards and prejudiced Mr. Hall's defense. Motion to Vacate Sentence and Conviction, Claim "U:"

1. Right to an Impartial jury.
   a. Perfunctory Voir Dire, e.g., no questions concerning racial bias in a highly charged interracial rape case.
   b. No examination concerning pretrial publicity.
   c. No examination concerning Mr. Hall's prior trial and conviction for a related crime.
   d. No request for additional peremptory challenges or individual voir dire.
   e. No objection to the prosecution's discriminatory use of peremptory challenges to exlude black jurors.
   f. No objection to insufficient admonitions to the jury.
   g. No objection to the release of jury from sequestration.
   h. No objection to inadequate admonitions of witness.
   i. Failure to insure the defendant's presence through the trial.
   j. Failure to object to defendant's appearance in prison garb.
   k. Failure to conduct a study of jury attitudes.

Mr. Hall was absent from several portions of his trial, none of them were stages at which he had a constitutional right to be present.[6]

The Florida Supreme Court concluded that, despite Mr. Hall's claim that he was involuntarily absent from seven parts of his

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2. Failure to ensure that all critical proceedings were recorded.
3. Failure to request instruction defining the burden of proof.
4. Failure to investigate the composition of the grand jury.
5. Failure to retain independent experts.
6. Failure to investigate Mr. Hall's competency to stand trial.
7. Failure to prevent jury from viewing Mr. Hall in shackles.
8. No objection to a suggestive photo identification.
9. No objection to the chain of custody of State's evidence.
10. No objection to testimony concerning things not in evidence.
11. Failure to argue to the jury concerning the prosecution's inability to connect Mr. Hall to the rape through scientific evidence although the State conducted many tests.
12. No motion for mistrial, despite the admission of evidence concerning a rape based upon misrepresentations by the prosecution.
13. Failure to object when a witness identified the victim as his sister.
14. Failure to present evidence in mitigation.
    a. Diminished capacity.
    b. Mr. Hall's prior hallucinations and mental problems.
    c. Family background.
15. Failed to investigate Mr. Hall's background.
16. Failed to conduct a psychiatric examination of Mr. Hall.
17. Failed to argue mitigating circumstances.
18. Allowed Mr. Hall to be sworn outside the presence of the jury.
19. Failed to guide Mr. Hall's testimony in the sentencing phase.
20. Failed to advise Mr. Hall about testifying.
21. Failed to object to improper argument.
22. Failed to seek limiting instruction on aggravating circumstances.
23. Failed to request an instruction on the permissibility of a life sentence even if there was sufficient evidence for a death sentence.
24. Failed to object to instructions placing burden of proof on the defense.
25. Failure to cross-examine medical examiner on victim's lack of pain and suffering.
26. Failure to argue diminished capacity.

[6]Secretary Wainwright concedes that the Florida Supreme Court directly addressed this claim with respect to Mr. Hall's absence from jury selection. (Petition for Cert. at 37.) A fair reading of that Court's opinion shows that the Supreme Court considered all of the alleged absences, and found none of them to have been from a "critical stage" of the trial.

trial, and that this violated his constitutional right to be present, ". . . [h]e was present at all critical stages of the proceedings and available to consult with counsel." 420 So.2d at 874.[7]

There is no dispute about the historical facts. Mr. Hall was absent from a number of parts of the trial, including the beginning of the selection of his jury; he was in handcuffs; he entered and left the courtroom at the directions of the trial judge. Hall's arrival in the courtroom did not coincide with any sharp line of demarcation between "general qualification of jurors" and "actual voir dire." (Tr. at 24.) It is plain from the trial record that before Mr. Hall entered, the trial judge had asked prospective jurors a number of questions, including a critically important question about their exposure to pretrial publicity concerning the case, and that he continued to ask questions for several transcript pages after Hall arrived in the room.

The District Court likewise rejected this constitutional claim without an evidentiary hearing, based upon its belief that as a matter of law, "Hall was present at all critical stages of the proceedings and was able to consult with counsel." The only "finding" on which the District Court relied was the Florida Supreme Court's characterization of the proceedings held in Mr. Hall's absence as the "general qualification of jurors" as distinct from the "actual voir dire." The Court of Appeals remanded for further consideration of the following questions, without deciding the merits of Mr. Hall's constitutional challenge:

(1) why Hall was absent during communications with

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[7]The record discloses the following additional absences:
(1) a discussion of various legal motions;
(2) counsel's stipulation to the excusal of an alternate juror;
(3) the marking of an exhibit for identification;
(4) the release of the remaining alternate jurors at the end of the guilt phase;
(5) the trial court's discussion with the jury concerning their request for certain items of evidence during their deliberations; and
(6) the trial judge's dismissal of the jury. (A33.)

the jury; (2) what was communicated to the jury and why; (3) whether Hall knowingly and willingly waived his right to be present; (4) was Hall removed from the courtroom because of misconduct; (5) what "security" reason caused Hall to be absent from the trial at one point; and (6) whether Hall's absence was at a non-critical stage of the trial, and, therefore, harmless. A35-36.

ARGUMENT

I. Petitioner invokes the values of federalism and respect for judicial hierarchy to arrive at two surprising propositions. First, Petitioner argues that this Court should devote its limited resources to deciding questions of law which the Court of Appeals did not resolve, without the benefit of the factfinding the Court of Appeals thought necessary. Second, Petitioner suggests that this Court should adopt a rule which would encourage state courts not to conduct fair and adequate hearings on constitutional claims, thereby diverting the federal court's habeas corpus inquiry from the merits to the sufficiency of the petitioner's opportunity to be heard in the state judicial system. Rather than improving relations within the federal system, this would only exacerbate tensions between state and federal judges. Instead of examining the quality of representation afforded, the federal courts would have to review the fairness of the hearing provided by the state judge.

A. Petitioner argues that a remand to the District Court is improper because the Eleventh Circuit "ignored the requirement of Rule 52(a) to accept district court factual findings not clearly erroneous." (Petition at 25; see also note 4 at 21.) Yet it is precisely out of respect for the District Court's institutional role as the finder of fact that the Court of Appeals remanded for an evidentiary hearing. The District Court did not conduct any kind of hearing on Mr. Hall's petition before dismissing his claims. Rather, it ruled, "as a matter of law . . . that Hall deliberately bypassed his opportunities for an evidentiary hearing on [his ineffective assistance claims] based upon the state trial judge's finding of deliberate bypass of the state court opportunity to develop that material fact, and an admission

by counsel that he bypassed his opportunity for tactical reasons." A.191 (emphasis added). This ruling "as a matter of law," was in error.

To begin with, the issue of "deliberate bypass" was not before the state court, which had no authority or jurisdiction to make findings on an issue that is purely a matter of federal procedure. 28 U.S.C. § 2254(d) provides for deference to factual findings by state courts of "competent jurisdiction" only; while the state court was competent with respect to the merits of the constitutional claims, it was not competent to adjudicate matters of federal jurisdiction.[8] Indeed, if this were true, a state court could always insulate its decisions from federal scrutiny by means of a gratuitous finding of "deliberate bypass."

Second, the District Court's reliance on an "admission" by Mr. Hall's counsel was unfounded. The District Court ignored the context of counsel's remarks--a lengthy protest against the state trial court's denial of a continuance and the unreasonable time constraints which hampered his preparation. If this was a finding of fact--and the District Court carefully avoided that label--it was clearly erroneous, since the documentary record as a whole refutes the District Court's reading. See Anderson v. City of Bessemer, ___ U.S. ___, 53 U.S.L.W. (BNA) 4314, 4319 (March 19, 1985) (Powell, J., concurring) (Court of Appeals should conduct meticulous review of entire record).[9]

Murch v. Mottram, 409 U.S. 1199 (1972), far from supporting the Petitioner, illustrates precisely why the District Court acted improperly when it failed to hold a hearing on the deliberate bypass issue. This Court, after reviewing the standard

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[8]Such a rule would be comparable to allowing state courts conclusively to decide that they had given a constitutional claim a "full and fair" hearing, as required by Stone v. Powell, 429 U.S. 874 (1976).

[9]In addition, it is clear that since the District Court improperly relied upon the state court "finding," the issue must be remanded for reconsideration without reliance upon this improper factor.

governing the exhaustion of state remedies,[10] observed that the District Court conducted a four-day evidentiary hearing to decide whether Mottram deliberately bypassed his opportunity to challenge his state conviction. In addition to reviewing the record of the state trial and post-conviction proceedings, the District Court heard the testimony of witnesses concerning Mottram's intent. The District Court conducted this hearing, notwithstanding a clear acknowledgment in the state court by Mottram's counsel, after consultation with his client, that he was not raising a constitutional challenge to his conviction, but only to the revocation proceedings.

Nothing in Murch v. Mottram suggests that the evidentiary hearing the District Court conducted was unnecessary, or that it should have decided the deliberate bypass issue solely on the record of the state court proceedings. To the contrary, Murch v. Mottram indicates that a district court should conduct a hearing when the state claims that a petitioner deliberately bypassed state factfinding.[11] See also, Wright & Soafer, Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility, 75 Yale L.J. 895, 971 and n.273 (1966); Rogers v. Israel, 746 F.2d 1288, 1295-96 (7th Cir. 1984); Thomas v. Zant, supra.

B. Federalism and comity do not support a rule which would encourage state courts not to conduct thorough hearings on federal constitutional claims.

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[10] In Murch, this Court applied the same "deliberate bypass" standard to the question of exhaustion of remedies which Petitioner applies to the interpretation of 28 U.S.C. § 2254(d), which governs deference to state findings of fact. It is undisputed that Mr. Hall fully presented his ineffective assistance of counsel claims to the state courts. For this reason, the Wainwright v. Sykes, 433 U.S. 272 (1977) "cause and prejudice" standard is inapplicable.

[11] The interests protected in 28 U.S.C. § 2254(d) are substantially different from those at stake in 28 U.S.C. § 2254(b). For one thing, there is little reason to suppose that a party is likely to withhold evidence in support of a claim which has been presented to a state court for tactical reasons. As applied in the Eleventh Circuit, the "deliberate bypass" standard of Townsend v. Sain, 372 U.S. 293 (1963) is an additional requirement over and above the mandate of 28 U.S.C. § 2254(d). See Thomas v. Zant, 697 F.2d 977 (11th Cir.), cert. denied, 459 U.S. 982 (1983).

Federal habeas corpus jurisdiction is premised on the state courts' conscientious discharge of their functions. The exhaustion requirement, 28 U.S.C. § 2254(b), compels a prisoner in state custody to present his claims in the first instance to the state courts, and to give them a fair opportunity to correct their own errors. Picard v. Connor, 404 U.S. 270 (1971); Rose v. Lundy, 455 U.S. 509 (1982). Section 2254 also minimizes friction between the courts of different sovereigns by requiring the federal courts to "presume correct" state findings of fact whenever the state proceedings are fair and adequate and the findings are supported by the record. E.g., Sumner v. Mata, 449 U.S. 539 (1981); Marshall v. Lonberger, 459 U.S. 422 (1983); Maggio v. Fulford, ___ U.S. ___, 103 S.Ct. 2261, 76 L.Ed. 794 (1983); Wainwright v. Goode, ___ U.S. ___, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983); Patton v. Yount, ___ U.S. ___, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984); Wainwright v. Witt, ___ U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). So long as the state courts conduct full inquiries into the law and facts, the federal court need do nothing more than correct errors of federal constitutional law which the state courts have failed to resolve, whether as a result of a change in the law, or through a misinterpretation of precedent.[12]

This system collapses if the state courts--as they did here--frustrate the purpose of the exhaustion doctrine by providing the form, but not the essence of a fair hearing. Mr. Hall has not tried to duplicate a state court hearing in the federal court; he is not looking for a second "bite at the apple."[13] All he is asking for--and all the Court of Appeals

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[12]The ultimate question, whether Mr. Hall's counsel were ineffective, is a mixed question of law and force to which Section 2254(d) does not apply. Cuyler v. Sullivan, 446 U.S. 335 (1980).

[13]This case does not raise the issue presented in Vasquez v. Hillery, Docket No. 84-836, cert. granted, March 4, 1985 (whether Mr. Hall failed to exhaust his state remedies by substantially enlarging the factual basis for his claim) because the state courts never gave him any opportunity to present any evidence in support of his Rule 3.850 motion. Similarly, Antone v. Dugger, ___ U.S. ___, 104 S.Ct. 962 (1984) concerns the standard for dismissal under Rule 9 of the Rules Governing

granted--is an opportunity to show that he did not deliberately forego his state court hearing, to show that he did not present evidence only because of the impossible time constraints placed on his counsel.

28 U.S.C. § 2254(d) provides, in part:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisidiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> . . . .
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> . . . .
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

These exceptions to the presumption of correctness--essentially a rule of issue preclusion--protect the integrity of the factfind-

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Section 2254 proceedings, for abuse of the writ, not the standard for treating state court findings, is conclusive. Indeed, the Eleventh Circuit's actions in Antone convincingly dispel the impression that the court seeks to multiply federal evidentiary hearings. See, e.g., Moore v. Zant, 722 F.2d 640 (1984); Birt v. Montgomery, 725 F.2d 587 (11th Cir. 1984).

ing process. 28 U.S.C. § 2254(d) gives the state courts the final say on questions of fact, so long as they give the habeas petitioner a fair opportunity to develop his case. If, as happened here, the state courts undermine that vital first stage--here the Rule 3.850 hearing was Mr. Hall's first opportunity to raise the incompetency of his trial and appellate counsel--they topple the entire structure of deference, exhaustion and limited review which this Court has erected.

The trial, or in this case, the post-trial hearing, cannot be "the main event" if the state courts will not make it so. It is only because state courts can and should hold adequate factfinding hearings that the federal courts must treat these findings as conclusive, 28 U.S.C. § 2254(d); Sumner v. Mata, supra; Patton v. Yount, supra; it is only because the earlier stages in the process ensure the adequate development of the record and the clarification of legal disputes that expedited appellate review is possible. Barefoot v. Estelle, ___ U.S. ____, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983).

This structure cannot rest on "findings" made without a hearing. The Due Process Clause "grants the aggrieved party the opportunity to present his case and have its merits fairly judged." Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982). The Florida courts' rush to judgment--motivated perhaps by a determination not to postpone Mr. Hall's execution--hardly serves this purpose.[14] This Court should deny the writ of certiorari, because the Eleventh Circuit's decision was faithful to both the letter and the spirit of Section 2254.

II. The Florida Supreme Court's holding that Mr. Hall's numerous absences from the courtroom during his trial did not violate the

[14]Secretary Wainwright's argument is a classic example of misleading ex post analysis. To be sure, had the Eleventh Circuit affirmed the District Court, it would mean one less hearing in federal court, but for the judicial system as a whole it would have eroded the balance between state and federal decisionmaking established by Section 2254. See generally, Easterbrook, Foreword, The Court and the Economic System, 98 Harv. L. Rev. 1, 10-14 (1984).

Constitution was not based upon factual findings about waiver or harmlessness, but upon the conclusion that--as a matter of law--none of the stages of the trial he missed were "critical stages" at which his presence was mandatory. The District Court uncritically adopted this legal conclusion, supported only by a citation to Howard v. Kentucky, 200 U.S. 164 (1906).

All three judges of the Court of Appeals agreed that this legal conclusion was premature, and they remanded for a hearing to determine the reasons for Mr. Hall's absences, the contents of the proceedings held in absentia, and the resulting prejudice or harmlessness to the defense. Judge Hill, although he believed that the Supreme Court had not reached Mr. Hall's allegations on the merits except with respect to his absence from jury selection, concluded that jury selection had long been recognized as a stage in a criminal trial at which the accused had a right to be present.[15]

The Eleventh Circuit's remand order is in perfect harmony with this Court's recent per curiam opinion in United States v. Gagnon, ___ U.S. ___, 53 U.S.L.W. (BNA) 3665 (March 18, 1985). Gagnon defined the standard governing the defendant's right to be present at a particular stage of a criminal trial to be whether "his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Id. at 3666, quoting Snyder v. Massachusetts, 291 U.S. 97 (1934). See also, Rushen v. Spain, ___ U.S. ___, 104 S.Ct. 453 (1983) (per curiam) (defendant's absence from in-chambers interview of juror constitutional harmless error).

The defendants in Gagnon challenged their absence from a brief conference between the trial judge, counsel for Gagnon, and a juror who had reported noticing Gagnon sketching members of the jury.

[Gagnon and his codefendants] could have done

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[15]The Court of Appeals did not rely upon the suggestion in Proffitt v. Wainwright, 706 F.2d 311, (11th Cir.), cert. denied, 104 S.Ct. 508 (1983), that a defendant in a capital case could not waive his right to be present. This issue is not before this Court.

> nothing had they been at the conference, nor would they have gained anything at attending. (Citations omitted.) Indeed, the presence of Gagnon and the other defendants, their four counsel, and the prosecutor could have been counterproductive. Juror Graham had quietly expressed some concern about the purpose of Gagnon's sketching, and the District judge sought to explain the situation. The Fifth Amendment does not require that all the parties be present when the court inquires into such a minor occurrence.

The proceedings which took place in Mr. Hall's absence were hardly such "minor occurrences." In the same opinion in which Justice Cardozo adopted the standard for determining whether the accused had a due process right to be present which this Court endorsed in Gagnon, supra, the Justice was careful to distinguish the issue before him--whether the defendant had a right to be present at a jury view of the crime scene--from earlier cases involving the right to be present during jury selection. He assumed the right to encompass "the presence of the accused during the examination of jurors."

Mr. Hall was absent from the first portion of the selection of his jury. This absence was inherently prejudicial because it impaired his ability to contribute to the exercise of peremptory challenges and challenges for cause, and because it fostered a perception in the mind of the jury of a person already stripped of the presumption of innocence, a subject of the judicial proceedings, but not a participant in them. Prejudice was particularly acute in this case, as Judge Hill recognized, because Mr. Hall was absent from the questioning of jurors on the vital subject of pretrial publicity. His physical appearance alone might have triggered conscious memory and acknowledgment of news reports which might later contribute to conscious or unconscious prejudgment. He might also have discerned the "bare looks and gestures" revealing racial prejudice which were of particular importance in a trial based upon a charge that one of two black men had raped and killed a white woman.

The role of the accused in the selection of the jury that is to try him is unique, and quite different from any role he could play in the later disqualification of examination of a juror

already chosen. As this Court wrote in Lewis v. United States, 146 U.S. 370, 375 (1892):

> The right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of the trial by jury.

"[T]he defense may be made easier if the accused is permitted to be present at the examination of jurors . . . for it will be in his power, if present, to give advice or suggestions, or even to supersede his lawyers altogethr and conduct the trial himself." Snyder v. Massachusetts, 291 U.S. at 106. The procedure followed at his trial robbed Mr. Hall of any role in the selection of the jury which was to decide upon his life or death. Yet it is a principle rooted in our constitutional and common law "that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for his dislike." 4 Blackstone's Commentaries 353, quoted in Lewis v. United States, 146 U.S. at 375.[16]

Mr. Hall was also absent repeatedly throughout the trial, including during communications between the court and the entire jury. See Shields v. United States, 273 U.S. 583, 588 (1927); United States v. Benavides, 549 F.2d 392 (5th Cir. 1977). These absences, individually and collectively, robbed him of the right to participate in, or even to control if he chose, his defense.

Because the record of the trial demonstrates that Mr. Hall was brought to and from the courtroom at the direction of the trial judge, A231-233, and because the factual determination that Mr. Hall was absent from the "general qualification" of his jury is binding under 28 U.S.C. § 2254(d), the Court of Appeals' decision to remand this case to the District Court was, if anything, overcautious. The record was sufficient, under long established standards, to reverse the District Court and to order

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[16] Even if peremptory challenges were not required by the Constitution, the procedure for their exercise must comport with constitutional standards. Evitt v. Lucey, 53 U.S.L.W.(BNA) 4101 (1984).

that he is given a new trial. See generally, Cross-Petition in Docket No. 84-6326, pp. 11-18.

The decision of the Court of Appeals is not in conflict with decisions of this Court, nor the courts of any jurisdiction. Secretary Wainwright's petition should therefore be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 84-1234

In The

SUPREME COURT OF THE UNITED STATES

LOUIE L. WAINWRIGHT, Secretary
Department of Corrections,
State of Florida,

Petitioner,

v.

FREDDIE LEE HALL,

Respondent.

CERTIFICATE OF SERVICE

I, David Adam Reiser, do hereby certify that I have served a copy of the Opposition to the Petition for a Writ of Certiorari and Respondent's Motion to Proceed In Forma Pauperis upon the Petitioner this 18th day of April, 1985, by mailing 2 copies, first class postage prepaid, to his counsel of record in the proceedings below at the following address: Robert J. Landry, Assistant Attorney General, 1313 Tampa Street, Suite 804, Tampa, Florida 33602.

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